A

SAMSUDIN MD SUPPIAN lwn. PP

MAHKAMAH RAYUAN, PUTRAJAYA
HADHARIAH SYED ISMAIL HMR
AZMAN ABDULLAH HMR
AZMI ARIFFIN HMR
B [RAYUAN JENAYAH NO: B-09-101-03-2022]
16 DISEMBER 2024

Abstrak – *Seksyen 305 Kanun Tatacara Jenayah ('KTJ') menjelaskan bahawa seorang tertuduh yang telah mengaku bersalah terhadap satu pertuduhan dan disabitkan atas pertuduhan itu, wajar dihalang daripada merayu terhadap sabitan itu. Rasional sebalik peruntukan ini adalah, apabila pengakuan salah tanpa syarat dibuat, tertuduh tidak sepatutnya merasa terkilan atas sabitan kerana pengakuan salah itu dibuat secara sukarela, tanpa apa-apa paksaan, pujukan atau janji oleh mana-mana pihak. Walau bagaimanapun, rayuan masih boleh dipertimbangkan jika sabitan yang direkodkan didapati tidak sah atau menyalahi undang-undang. Jika wujud keadaan sedemikian, mahkamah di peringkat rayuan boleh melaksanakan kuasa semakannya bawah s. 323(1) KTJ.*

PROSEDUR JENAYAH: *Rayuan – Rayuan terhadap sabitan dan hukuman – Sabitan atas kesalahan bawah s. 376B Kanun Keseksaan – Rayuan selepas pengakuan bersalah – Sama ada rayuan boleh dipertimbangkan – Sama ada sabitan yang direkodkan sah – Sama ada kuasa penyemakan hanya boleh dilaksanakan bawah s. 323(1) Kanun Tatacara Jenayah – Sama ada pengakuan bersalah dibuat tanpa syarat dan perayu mengetahui sifat dan akibat pengakuan salah – Sama ada terdapat kesilapan tatacara dalam pengakuan salah – Sama ada sabitan selamat – Sama ada hukuman wajar dikekalkan*

PROSEDUR JENAYAH: *Pengakuan bersalah – Sabitan atas pengakuan – Kesalahan bawah s. 376B Kanun Keseksaan – Rayuan terhadap sabitan dan hukuman selepas pengakuan bersalah – Sama ada rayuan boleh dipertimbangkan – Sama ada sabitan yang direkodkan sah – Sama ada kuasa penyemakan hanya boleh dilaksanakan bawah s. 323(1) Kanun Tatacara Jenayah – Sama ada pengakuan bersalah dibuat tanpa syarat dan perayu mengetahui sifat dan akibat pengakuan salah – Sama ada terdapat kesilapan tatacara dalam pengakuan salah – Sama ada sabitan selamat – Sama ada hukuman wajar dikekalkan*

Perayu dituduh di Mahkamah Jenayah Seksual Terhadap Kanak-Kanak bawah s. 376B Kanun Keseksaan ('KK') dan boleh dihukum bawah s. 376(3) KK dan dibaca bersama-sama s. 16(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta') atas kesalahan merogol cucu kandungnya, yang berumur tujuh tahun tujuh bulan pada masa kejadian.

Perayu mengaku bersalah, memahami sifat dan akibat pengakuan salahnya. Fakta kes yang dibacakan turut diakui benar oleh perayu. Perayu, oleh itu, disabitkan atas pertuduhan tersebut dan dijatuhkan hukuman berikut: (i) penjara 18 tahun bermula dari tarikh tangkap; (ii) perayu diperintahkan menjalani kaunseling pemulihan selama sepuluh tahun mengikut peruntukan s. 26(1) Akta; dan (iii) perayu diperintahkan menjalani pengawasan polis selama tiga tahun setelah selesai menjalani hukuman pemenjaraan menurut s. 27(1) Akta. Tidak berpuas hati dengan keputusan tersebut, perayu telah memfailkan notis rayuan ke Mahkamah Tinggi terhadap hukuman sahaja, manakala, pihak Pendakwa Raya memfailkan rayuan silang atas hukuman. Walau bagaimanapun, perayu kemudiannya, melalui peguam belanya, merayu terhadap sabitan dan hukuman. Di Mahkamah Tinggi, rayuan perayu ditolak dan Pesuruhjaya Kehakiman mengekalkan sabitan dan hukuman yang dijatuhkan dan membenarkan rayuan silang Pendakwa Raya dengan hukuman pemenjaraan dinaikkan hingga 20 tahun. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan perayu terhadap hukuman dan sabitan) Oleh Azmi Ariffin HMR menyampaikan penghakiman mahkamah:

(1) Walaupun s. 305 Kanun Tatacara Jenayah ('KTJ') menyekat rayuan terhadap sabitan setelah pengakuan salah dirakamkan, namun, ini masih boleh dipertimbangkan di peringkat rayuan jika sabitan yang direkodkan didapati tidak sah atau menyalahi undang-undang dan sebagainya. Dalam situasi demikian, Mahkamah Rayuan dibenarkan, jika bersesuaian, melaksanakan kuasa penyemakan bawah s. 323(1) KTJ 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate court' untuk mengetepikan sabitan dan hukuman tersebut jika terdapat alasan yang kukuh untuk bertindak sedemikian. Hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak ('hakim'), sebelum merekodkan pengakuan salah dan sabitan terhadap perayu dan hukuman dijatuhkan, perlu memastikan bahawa pengakuan salah tersebut dibuat tanpa syarat dan perayu mengetahui sifat dan akibat pengakuan salahnya itu. Prosedur ini mesti dipatuhi dengan ketat tanpa gagal seperti yang diperuntukkan bawah s. 173(b) KTJ. Mahkamah memutuskan untuk menyemak kembali perintah yang telah dibuat melalui kuasa yang diberikan bawah peruntukan tersebut. (perenggan 28 & 29)

(2) Hakim telah mematuhi kesemua kehendak peruntukan bawah s. 173(b) KTJ sebelum merekodkan sabitan dan hukuman terhadap perayu. Kesemua keterangan dokumentari yang dikemukakan, yang telah dibacakan dan diterangkan pada perayu, diakui benar oleh perayu. Perayu juga telah mengemukakan mitigasinya sebelum mahkamah menjatuhkan hukuman. Pesuruhjaya Kehakiman mengesahkan dan mengekalkan sabitan setelah mendapati tiada kesilapan tatacara dalam

pengakuan salah perayu dan pengakuan perayu didapati tidak bersyarat. Tiada sebarang ketidakpatuhan atau pelanggaran prosedur yang berlaku sehingga memprejudiskan perayu atau mendatangkan apa-apa ketidakadilan undang-undang sepanjang perjalanan prosiding ini. Oleh itu, sabitan didapati selamat. (perenggan 31-33)

(3) Kes-kes yang melibatkan jenayah seksual adalah suatu kesalahan keji dan mengaibkan lebih-lebih lagi dalam kes ini di mana mangsa telah dirogol oleh datuknya sendiri. Lebih memalukan perayu ketika itu berusia 68 tahun tergamak merogol cucunya sendiri, seorang murid sekolah darjah satu, yang pada ketika itu baru sahaja berusia tujuh tahun tujuh bulan. Amanah yang diletakkan atas bahu perayu oleh kedua-dua ibu bapa mangsa untuk menjaga cucunya telah dikhianati oleh perayu. Susulan itu, hukuman berat wajar dikenakan terhadap perayu sebagai pengajaran pada perayu dan amaran pada masyarakat umum agar jangan sesekali terlibat dalam jenayah sebegini di masa hadapan. (perenggan 40 & 41)

(4) Walaupun perayu telah membuat pengakuan salah dan menjimatkan masa dan kos kesemua pihak yang terlibat, termasuk saksi-saksi pendakwaan yang juga tidak perlu dipanggil untuk memberi keterangan, namun, kepentingan individu tidak harus mengatasi kepentingan awam. Oleh itu, rayuan perayu terhadap sabitan dan hukuman ditolak sebulat suara. (perenggan 44 & 45)

English *Headnotes*

The appellant was charged at the Court for Sexual Offences Against Children under s. 376B of the Penal Code ('PC'), which was punishable under s. 376(3) of the PC read together with s. 16(1) of the Sexual Offences Against Children Act 2017 ('Act'), for committing incest with his biological granddaughter, aged seven years and seven months, at the time of the offence. The appellant pleaded guilty, having understood the nature and effect of the guilty plea. The facts of the case that was read to him was confirmed to be true by the appellant. Therefore, the appellant was convicted on the charge and sentenced to: (i) 18 years imprisonment from the date of arrest; (ii) undergo rehabilitation counselling for ten years pursuant to s. 26(1) of the Act; and (iii) undergo police supervision for three years upon completion of the sentence of imprisonment pursuant to s. 27(1) of the Act. Dissatisfied with the decision, the appellant filed a notice of appeal to the High Court only against the sentence, whereas, the Public Prosecutor filed a cross-appeal against the sentence. However, the appellant subsequently, through his defence counsel, appealed against the conviction and sentence. At the High Court, the appellant's appeal was dismissed, and the Judicial Commissioner ('JC') affirmed the conviction and sentence and allowed the Public Prosecutor's cross-appeal and the sentence of imprisonment was increased to 20 years. Hence, this appeal.

Held (dismissing appellant's appeal against sentence and conviction)
Per Azmi Ariffin JCA delivering the judgment of the court:

(1) While s. 305 of the Criminal Procedure Code ('CPC') precludes an appeal against conviction and sentence where a plea of guilty has been recorded, this could still be considered by the appellate court if the conviction that was recorded was found to be illegal or unlawful and so on. In such a situation, the Court of Appeal is allowed, if found appropriate, to exercise its revisionary power under s. 323(1) of the CPC 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate court' to set aside the conviction and sentence if there exist valid reason for such action. The Judge of the Court for Sexual Offences Against Children ('judge'), before recording the plea of guilty and the conviction against the appellant and meting out the sentences, ought to ensure that the plea of guilty was without qualification and the appellant was aware of the nature and consequence of his plea of guilty. This procedure must be followed strictly without fail as provided under s. 173(b) of the CPC. The court decided to revise the order pursuant to the powers provided under the section.

(2) The judge had complied with all the requirements in the provision under s. 173(b) of the CPC before recording the conviction and sentence against the appellant. All the documentary evidence presented, that were read and explained to the appellant, had been admitted as true by the appellant. The appellant had also presented his mitigation plea before the court meted out the sentences. The JC affirmed and retained the conviction upon finding that there was no mistake in the procedure in the appellant's plea of guilty and his plea was without qualification. There was no non-compliance or breach of procedure that took place causing prejudice to the appellant or causing any miscarriage of justice to him in the course of the proceedings. Therefore, the conviction was found to be safe.

(3) The cases relating to sexual offences are heinous and disgraceful, more so in this case, where the victim had been raped by her own grandfather. It was more humiliating when the appellant, who at the material time was aged 68, raped his own granddaughter, a standard one student who was only aged seven years and seven months. The trust put on the appellant by the parents of the victim to care for his granddaughter had been betrayed by the appellant. Hence, a heavy sentence ought to be imposed on the appellant as a deterrent and to deter the general public from getting involved in such crime in the future.

(4) Although the appellant pleaded guilty and saved the time and costs for all parties involved, including the prosecution witnesses who need not be called to testify, the interest of an individual ought not to outweigh public interest. Therefore, the appellant's appeal against the conviction and sentence was unanimously dismissed.

Kes-kes yang dirujuk:
Bhandulananda Jayatilake v. PP [1981] CLJU 139; [1981] 1 LNS 139 FC ***(refd)***
Hajar Ishak v. PP [2000] 4 CLJ 46 HC ***(refd)***
Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Norshaharin v. PP [2002] 5 CLJ 492 HC ***(refd)***
Ong Lai Kim & Ors v. PP [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC ***(refd)***
PP v. Paghutheen [1968] CLJU 110; [1968] 1 LNS 110 HC ***(refd)***
PP v. Prabu Veeramuthu & Ors [2010] 8 CLJ 257 CA ***(refd)***
PP v. Ramakrishnan Subramaniam & Ors [2012] 9 CLJ 443 CA ***(refd)***
PP v. William Ayau [2005] 6 CLJ 289 HC ***(refd)***
Tuan Mat Tuan Lonik v. PP [2009] 4 CLJ 638 CA ***(refd)***
Wong Siak Fon v. PP [1972] CLJU 172; [1972] 1 LNS 172 HC ***(refd)***

Perundangan yang dirujuk:
Courts of Judicature Act 1964, ss. 56, 60
Criminal Procedure Code, ss. 173(b), 305, 323(1)
Penal Code, ss. 376(3), 376B
Sexual Offences Against Children Act 2017, ss. 16, 26(1), 27(1)

Bagi pihak perayu - Muhamad Afiq Audy & Nurliny Che Soh; Nurliny & Co
Bagi pihak responden - Sarulatha Paramavathar; TPR

[Editor's note: For the High Court judgment, please see Samsudin Md Suppian lwn. PP [2022] CLJU 757; [2022] 1 LNS 757 (affirmed).]

Dilaporkan oleh S Barathi

PENGHAKIMAN

Azmi Ariffin HMR:

Kronologi Peristiwa

[1] Pada 5 Ogos 2021, perayu telah dituduh di Mahkamah Jenayah Seksual Terhadap Kanak-Kanak di Putrajaya di atas pertuduhan berikut:

> Bahawa kamu pada 01/04/2018 jam lebih kurang 6.30 petang beralamat di Rumah E-1-26 Blok E Jalan BM 4/5 Persiaran Mahkota Seksyen 4, Bandar Bukit Mahkota 43000 Kajang, di dalam Daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, sebagai seorang yang mempunyai hubungan amanah iaitu datuk kandung, telah merogol seorang kanakkanak perempuan bernama xxxx (No Mykid: xxx) yang berumur 7 tahun 7 bulan sewaktu kejadian yang mana oleh kerana perhubungan kamu dengannya adalah tidak dibenarkan di bawah undang-undang hukum agama yang terpakai kepada kamu untuk berkahwin. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 376B

Kanun Keseksaan dan boleh dihukum dibawah seksyen 376(3) Kanun Keseksaan dan dibaca bersama seksyen 16(1) Akta KesalahanKesalahan Seksual Terhadap Kanak-Kanak 2017.

[2] Pada 16 Ogos 2021, perayu telah mengaku salah, memahami sifat dan akibat pengakuan salahnya. Fakta kes yang dibacakan turut diakui benar oleh perayu.

[3] Puan Hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak yang bijaksana telah mensabitkan perayu di atas pertuduhan tersebut dan menjatuhkan hukuman seperti berikut:

(i) hukuman pemenjaraan selama lapan belas (18) tahun bermula dari tarikh tangkap (5 Ogos 2021);

(ii) perayu diperintahkan untuk menjalani kaunseling pemulihan selama sepuluh tahun mengikut peruntukan s. 26(1) Akta Kesalahan-kesalahan Seksual Terhadap Kanak-Kanak 2017; dan

(iii) perayu diperintahkan untuk menjalani pengawasan polis selama tiga tahun setelah selesai menjalani hukuman pemenjaraan menurut s. 27(1) Akta Kesalahan-kesalahan Seksual Terhadap Kanak-Kanak 2017.

[4] Tidak berpuas hati dengan keputusan tersebut, pada 17 Ogos 2021 perayu telah memfailkan notis rayuan ke Mahkamah Tinggi Shah Alam terhadap hukuman sahaja. Pihak Pendakwa Raya juga turut memfailkan rayuan silang atas hukuman.

[5] Perayu kemudiannya telah melantik Tetuan Rafaei & Co sebagai peguam belanya. Pada 26 Ogos 2021 peguam bela perayu telah memfailkan notis rayuan ke Mahkamah Tinggi Shah Alam terhadap sabitan dan hukuman.

[6] Pada 2 Mac 2022, Pesurujaya Kehakiman Mahkamah Tinggi Shah Alam yang bijaksana telah menolak rayuan perayu dan mengekalkan sabitan yang djatuhkan oleh Puan Hakim Jenayah Seksual Terhadap Kanak-Kanak yang bijakasana. Namun begitu, hukuman pemenjaraan selama lapan belas (18) tahun telah dinaikkan kepada dua puluh (20) tahun pemenjaraan setelah Mahkamah Tinggi membenarkan rayuan silang Pendakwa Raya.

[7] Terkilan dengan keputusan tersebut, pada 14 Mac 2022, perayu telah memfailkan satu notis rayuan ke Mahkamah Rayuan terhadap sabitan dan hukuman. Namun setakat 19 Oktober 2023, petisyen rayuan masih belum difailkan.

[8] Petisyen perayu bertarikh 2 November 2021 telah difailkan oleh peguam bela perayu.

[9] Selanjutnya, melalui lampiran 19 bertarikh 28 Disember 2023, satu notis usul telah difailkan oleh perayu bagi mendapatkan perintah kebenaran memfailkan petisyen rayuan di luar tempoh masa di Mahkamah Rayuan di bawah s. 56 Akta Mahkamah Kehakiman 1964.

[10] Pada 21 Februari 2024, Mahkamah Rayuan telah membenarkan lampiran 19 tersebut dengan perintah seperti berikut:

(i) pemohon/perayu dibenarkan untuk mendapatkan kebenaran Mahkamah Rayuan yang Mulia ini untuk memfailkan notis usul ini; dan

(ii) pemohon/perayu dibenarkan untuk melanjutkan masa bagi memfailkan petisyen rayuan dalam masa sepuluh hari selepas mendapat perintah ini.

[11] Pada 27 Februari 2024 peguam bela baru yang dilantik (Tetuan Nurliny & Co) oleh perayu telah memfailkan satu lagi petisyen rayuan yang baru (kandungan 33) ke Mahkamah Rayuan.

Fakta Kes Secara Ringkas

[12] Pada April 2018 lebih kurang jam 6.30 petang semasa berada di alamat: E-1-26 Jalan BM 4/5 Off Persiaraan Mahkota Seksyen 4, Bandar Bukit Mahkota 43000 Kajang Selangor, ketika mangsa/pengadu (berumur tujuh tahun tujuh bulan) selesai mandi dengan berkemban kain tuala dan masuk ke bilik hendak memakai baju, tiba-tiba perayu telah masuk ke bilik dan telah menyuruh mangsa baring di atas katil. Perayu membuka kain pelikatnya. Kemudian perayu telah memasukkan kemaluannya ke dalam kemaluan mangsa. Mangsa terasa basah seperti air keluar di kemaluannya. Kemudian perayu bangun dan telah meninggalkan mangsa. Kejadian seperti itu berlaku berulang kali ketika ibu dan ayah mangsa tiada di rumah. Perayu berpesan kepada mangsa supaya tidak beritahu kepada ibu dan ayahnya. Pengadu tidak memberitahu kepada ibu bapanya kerana takut kepada perayu.

[13] Pada 5 Ogos 2021, mangsa telah membuat satu laporan polis di Balai Polis Bangi, Selangor tentang kejadian yang berlaku ini. Laporan Polis Bangi /001724/21 ditandakan sebagai eksh. P2.

[14] Bertindak atas laporan yang diterima, pada tarikh yang sama jam lebih kurang 4 petang, Inspektor Mohd Faeez bin Norzah yang merupakan pegawai penyiasat kes bersama sepasukan anggota polis dari Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Kajang, Selangor telah pergi ke tempat kejadian dan mendapati perayu sedang berada di dalam bilik tengah rumah tersebut. Perayu telah ditangkap dan dibawa ke Ibu Pejabat Polis Daerah Kajang untuk siasatan lanjut.

[15] Pada tarikh yang sama, jam lebih kurang 6 petang mangsa telah dibawa oleh pihak polis ke Hospital Kajang untuk pemeriksaan perubatan. Hasil pemeriksaan fizikal yang dilakukan oleh Doktor Amir Arief bin Ahmad Saifuddin pegawai perubatan mengesahkan bahawa terdapat koyakan lama

pada hymen mangsa pada kedudukan jam tiga dan sembilan. Laporan Perubatan bertarikh 5 Ogos 2021 ditandakan sebagai eksh. P6.

Peruntukan Undang-Undang

(i) Seksyen 376B Kanun Keseksaan memperuntukkan seperti berikut:

> Punishment For Incest
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> 376B. (1) Whoever commits incest shall be punished with imprisonment for a term of not less than ten years and not more than thirty years, and shall also be liable to whipping.

(ii) Seksyen 376 (3) Kanun Keseksaan memperuntukkan seperti berikut:

> Punishment For Rape
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> 376. (1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be punished with whipping.
>
> (2) … (a)-(k)
>
> (3) Whoever commits rape on a woman whose relationship to him is such that he is not permitted under the law, religion, custom or usage, to marry her, shall be punished with imprisonment for a term of not less than eight years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.

(iii) Seksyen 16 Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 memperuntukkan seperti berikut:

> Section 16. Person in a relationship of trust
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> (1) If a person who commits any offence under this Act or any offence specified in the Schedule against a child, is in a relationship of trust with the child, such person shall, in addition to the punishment to which he is liable for such offence, be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less than two strokes.
>
> (2) In this section, a person is said to be in a relationship of trust with a child if the child is under his care, supervision or authority, including but not limited to -
>
> (a) a parent, guardian or person who is related through full-blood or half-blood, or through marriage or adoption, including de facto adoption;
>
> (b) a person who looks after one or more children for valuable consideration for any period of time;
>
> (c) a teacher, lecturer or warden of a kindergarten, school, public institution of higher learning or private institution of higher learning;

A (d) any person providing healthcare services in a Government healthcare facility or private healthcare facility as defined in section 2 of the Private Healthcare Facilities and Services Act 1998 [Act 586];

(e) a coach; and

B (f) a public servant of whatever rank in the course of his duty under any written law in respect of the child.

(iv) Seksyen 60 Akta Mahkamah Kehakiman 1964 memperuntukkan seperti berikut:

C **Section 60. Powers of Court of Appeal**

(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, D or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

E Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(2) At the hearing of an appeal the Court of Appeal may, if it thinks F that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

G (3) The Court of Appeal shall in no case make any order under this section as to payment of costs of any appeal to or by the appellant or respondent.

Petisyen Rayuan Perayu

(a) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi H undang-undang dan fakta apabila gagal mempertimbangkan pengakuan salah yang telah dibuat oleh Perayu pada 16 Ogos 2021 tidak selaras dengan keperluan di bawah seksyen 173(b) Kanun Tatacara Jenayah;

(b) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi I undang-undang dan fakta berkenaan pemahaman menyeluruh Perayu terhadap kandungan pertuduhan dan kesan pengakuan salah Perayu pada 16 Ogos 2021;

(c) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal menimbangkan situasi Perayu tidak dinasihafkan untuk mendapatkan khidmat nasihat peguam semasa pengakuan salah Perayu pada 16 Ogos 2021 memandangkan graviti kesalahan yang berat;

(d) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta untuk menimbangkan keperluan pemakaian prinsip keadilan asasi (natural justice) dalam keadaan Perayu tidak diwakili oleh Peguam semasa pengakuan salah dibuat;

(e) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menerima -pakai Laporan Pemeriksaan Awal (Eksibit P-6) yang telah ditandakan melalui Perayu pada 16 Ogos 2021 yang mana Perayu pada seluruh masa material tidak mempunyai kapasiti dan pengetahuan untuk memperakui keesahan dan kebenaran kandungan Eksibit P-6 tersebut;

(f) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila berpendapat mitigasi Perayu pada 16 Ogos 2021 sebagai suatu mitigasi yang jelas sedangkan mitigasi Perayu tersebut adalah bersifat ringkas dan menunjukkan bahawa Perayu tidak memahami kesan pengakuan salah Perayu tersebut;

(g) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila bersetuju dengan Hakim Mahkamah Sesyen berkenaan prinsip-prinsip faktor mitigasi yang digunapakai oleh Hakim Mahkamah Sesyen;

(h) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menambah hukuman penjara Perayu daripada 18 tahun penjara kepada 20 tahun penjara dari tarikh tangkap dan mengekalkan hukuman lain oleh Hakim Mahkamah Sesyen tanpa mengambil kira faktor usia Perayu; dan

(g) Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal menimbangkan sabitan salah terhadap Perayu adalah sabitan yang tidak selamat.

Isu-Isu Utama Untuk Penentuan

[16] Petisyen rayuan di atas hanya terhad kepada dua isu sahaja iaitu:

(i) sabitan adalah tidak selamat dan harus diketepikan; dan

(ii) hukuman pemenjaraan adalah terlalu tinggi.

Keputusan Kami

[17] Peruntukan terpenting di sini adalah s. 305 Kanun Tatacara Jenayah yang memperuntukkan seperti berikut:

A

> Section 305. When plea of guilty limited right of appeal.
>
> When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

B **[18]** Peruntukkan s. 305 Kanun Tatacara Jenayah ini jelas menyatakan bahawa seseorang tertuduh yang mengaku salah dan disabitkan di atas sesuatu pertuduhan hendaklah dihalang daripada merayu terhadap sabitan tersebut. Rayuan hanya terhad terhadap berat atau kesahan hukuman itu sahaja (there shall be no appeal except as to the extent or legality of the sentence).

C **[19]** Rasional di sebalik peruntukan ini adalah seseorang yang mengetahui dan menyedari sifat serta akibat pengakuan salahnya yang dibuat tanpa syarat tidak sepatutnya merasa terkilan di atas sabitan yang direkodkan. Ini adalah kerana beliau sendiri yang memilih untuk berbuat demikian dengan sukarela tanpa apa-apa paksaan, pujukan atau janji daripada mana-mana pihak.

D **[20]** Persoalan yang berbangkit di sini adalah, bolehkah kami di peringkat rayuan ini mempertimbangkan lagi rayuan perayu terhadap sabitan? Tidakkah pintu rayuan atas sabitan telah ditutup dengan serapat-rapatnya dan dikunci dengan dikemas sehingga tidak lagi boleh dibuka atau dirayu oleh perayu setelah perayu dengan rela hati memilih untuk mengaku salah terhadap pertuduhan tersebut

E

[21] Bagi merungkai persoalan ini adalah penting bagi kami untuk meneliti beberapa otoriti-otoriti duluan sebagai panduan.

[22] Dalam kes *PP v. Paghutheen* [1968] CLJU 110; [1968] 1 LNS 110; [1969] 1 MLJ 25, Ong Hock Sim H (beliau pada ketika itu) menyatakan

F seperti berikut:

> … where an accused person has been convicted by the magistrate on his own plea of guilty and is precluded from appealing against the legality of the sentence under s. 305 of the States Code, the appellate court can always in a proper case exercise its powers of revision, I decided to revise

G this case. I find in the circumstances, justice is best done if I quash the conviction on these charges and order the fines to be refunded.

[23] Dalam kes *Wong Siak Fon v. PP* [1972] CLJU 172; [1972] 1 LNS 172; [1972] 1 MLJ 203 di ms 205, Lee Hun Hoe H (beliau pada ketika itu) menyatakan seperti berikut:

H

> In the present case although the appellant has no right of appeal against his conviction the appellate court is entitled to look into the record and, if there is any irregularity which occasions a failure of justice, the court will exercise its powers of revision.

I

[24] Dalam kes *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209; [1995] 1 MLJ 645, Gopal Sri Ram HMR (beliau pada ketika itu) dalam menyampaikan penghakiman majoriti Mahkamah Rayuan menyatakan seperti berikut: A

> I begin by recognising that under s. 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the Judge hearing the case to act in revision. Of course, the appellant in such a case ought, wherever possible, to give the Court and the Public Prosecutor adequate notice of this, setting out the grounds on which the revision will be sought. A Court hearing an appeal against sentence is entitled to and will where appropriate, act in revision and set aside a conviction. The Malayan Law Journal is replete with pronouncements that support this proposition and I need only mention the decisions in *Low Hiong Boon v. PP* [1948-49] MLJ Supp. 135 and *Tang Kee Chie v. PP* [1987] 430 as illustrations of the principle. Reference may also be usefully had to the remarks of Thomson CJ in *Ho Kin Luan v. PP* [1959] CLJU 33; [1959] 1 LNS 33[1959] MLJ 159, at 161. B C D
>
> In *Tang Kee Chie* (*supra*), Chong Siew Fai J (now FCJ) stated the principle in the following words: E
>
> Learned Counsel for the prosecution, obviously with s. 305 of the Criminal Procedure Code and/or s. 50(2) of the Courts of Judicature Act, 1964 in mind, submitted that since the appellant had pleaded guilty and was convicted on such plea, there could be no appeal against conviction. I need only refer to the following cases to illustrate that convictions were set aside where the accused persons were convicted on their own plea of guilty. *Heng Kim Khoon v. Public Prosecutor* [1971] CLJU 38; [1971] 1 LNS 38, *Subramaniam & Anor. v. Public Prosecutor* [1975] CLJU 169; [1975] 1 LNS 169. If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no Court would have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of appeal, this Court as the appellate Court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned. F G
>
> In *Manokaran v. PP* [1978] CLJU 118; [1978] 1 LNS 118[1979] 1 MLJ 262 Abdoolcader J (as he then was) dealt with the revisionary power in the following way: H
>
> I have however not only extensive powers of revision in criminal proceedings under the provisions of s. 325 of the Criminal Procedure Code but even wider powers conferred by s. 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers I

of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of s. 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to, Counsel on both sides of the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in In re Chunbidya & Ors. to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal.

The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v. R* [1936] CLJU 12; [1936] 1 LNS 12[1936] MLJ 261.

[25] Dalam kes *Mohammad Hassan v. PP* [1997] 1 CLJ Supp 485, Augustine Paul PK (beliau pada ketika itu) menyatakan seperti berikut:

the accused pleaded guilty before the Magistrate' Court at Jasin, Melaka on account of possessing and with intention to sell an admission permit which was found to be a forged permit an offence under s. 56(1A)(b) of the Immigration Act 1959/63 ('the Act') and he was imposed a sentence of one year's imprisonment under s. 57 of the Act. It was uncertain whether the accused admitted the facts as contained in the summary of the facts of the case ('exh. P2'). There was no record to show that the facts were explained to the accused. It was also not shown in the record that the guilty plea of the accused was accepted by the learned magistrate. The accused appealed against the sentence.

In considering the proper order to be made, I bear in mind s. 305 of the CPC which provides that a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the court hearing the appeal to act in revision. The court is entitled to and will, where appropriate, act in revision and set aside a conviction (see *Lee Yu Fah & Ors v. PP*) and *Mohd Dalhar bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 (CA)).

Upon revision, the proper order for the High Court to make is to set aside the plea of guilty and and substitute it with a plea of not guilty and send the case back to the trial court (see *PP v. Mohamed Termizi*).

[26] Dalam kes *Hajar Ishak v. PP* [2000] 4 CLJ 46, Zainun Ali H (beliau pada ketika itu) memutuskan seperti berikut: A

> Section 305 CPC provides that a person who has been convicted on his plea of guilty is entitled to appeal only against the extent or legality of his sentence. However, the court is entitled to, and will where appropriate, act in revision and set aside the conviction. In the instant appeal, upon revision, the proper order for the court to make would be to set aside the plea of guilty and substitute it with a plea of not guilty and send the case back to the trial court. (*PP v. Mohamed Termizi*). B
>
> Thus, after considering the various issues involved in this appeal, and upon considering the submissions of both the learned DPP and counsel for the appellant, this court finds that there are grounds to act in revision and accordingly quash the conviction and sentence and remit the case to be retried before another Sessions Court. C

[27] Dalam kes *Norshaharin v. PP* [2002] 5 CLJ 492, VT Singham PK (beliau pada ketika itu) menyatakan seperti berikut: D

> This court is of the view that the function of the court in respect of a statutory provision which is expressly clear is merely to interpret the provisions of the statute and not to include or import words into the statute. If s. 305 of the Criminal Procedure Code expressly and clearly states that there shall be no appeal accorded to an accused person who has pleaded guilty and been convicted by a court on such plea except as to the extent or legality of the sentence, this court cannot import words into the statute to state that "... an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law" as that inclusion to s. 305 of the Criminal Procedure Code would with respect amount to usurping the function of the legislature. Every statutory provision or limitation in a statute must have a purpose and becomes law after a debate in parliament and passed by parliament. Unless and until such provision or limitation in the statute are strictly adhered to by litigants, the High Courts will be flooded with appeals against conviction where an accused person has pleaded guilty and the sentence has been imposed in accordance with the law and in the exercise of a judicial discretion. This court is of the view that if the limitation of an appeal against conviction as provided under s. 305 of the Criminal Procedure Code is not strictly observed and the views in *Manokaran & Anor v. PP* [1979] 1 MLJ 262, is allowed to prevail there is no guarantee that there will be no abuse by litigants who may wish to try their luck by lodging an appeal against the conviction. E F G H
>
> Notwithstanding that this court would prefer to follow the views in *Mohammad Hassan v. PP* [1997] 1 CLJ Supp 485, this court wishes to make it clear that an accused person who has appealed against the sentence imposed by the lower court where he has pleaded guilty is not prevented from urging the appellate court to act in revision at the hearing of the I

A appeal in respect of the conviction which the appellant has no statutory right of appeal if it is found that the conviction is illegal or if the charge discloses no offence in law (see *Sures Perumal v. PP* [2001] 2 CLJ 88 and *Veerian T Latchmanen v. PP* [2001] 7 CLJ 466). Both the two cases are the decision of this court (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134 at 137-138).

B

[28] Berdasarkan kepada nas undang-undang di atas adalah jelas bahawa walaupun s. 305 Kanun Tatacara Jenayah menyekat rayuan terhadap sabitan dibuat setelah pengakuan salah dirakamkan, namun kami di peringkat rayuan ini masih boleh mempertimbangkan rayuan terhadap sabitan tersebut jika kami mendapati sabitan yang direkodkan itu adalah tidak sah atau menyalahi
C undang-undang dan sebagainya. Dalam situasi demikian, kami dibenarkan, jika bersesuaian, melaksanakan kuasa penyemakan yang diberikan di bawah s. 323(1) Kanun Tatacara Jenayah 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that
D subordinate court' untuk mengetepikan sabitan dan hukuman tersebut jika terdapat alasan yang kukuh untuk kami bertindak sedemikian.

[29] Persoalan kedua adalah sama ada Hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak sebelum merekodkan pengakuan salah dan sabitan terhadap perayu dan hukuman dijatuhkan telah memastikan bahawa
E pengakuan salah tersebut dibuat tanpa bersyarat dan perayu mengetahui sifat dan akibat pengakuan salahnya itu. Prosedur ini mesti dipatuhi dengan ketat tanpa gagal sepertimana yang telah diperuntukkan di bawah s. 173(b) Kanun Tatacara Jenayah. Dengan ini, kami memutuskan untuk menyemak kembali perintah yang telah dibuat melalui kuasa yang diberikan di bawah
F peruntukan tersebut.

Section 173. Procedure In Summary Trials

The following procedure shall be observed by Magistrates in summary trials:

G (b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law: Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

H

[30] Bagi menentukan sama ada prosedur ini dipatuhi atau tidak, maka adalah penting bagi kami membentangkan nota prosiding (kandungan 14 rekod rayuan Jilid 3 m/s 1 hingga 3) tentang apa yang berlaku pada 16 Ogos 2021 di hadapan Hakim Mahkamah Jenayah Seksual Terhadap
I Kanak-Kanak, Putrajaya tersebut.

Isnin, 16 Ogos 2021

No. Kandungan: 1

Jenis Prosiding: Sebutan

Pendakwa Raya: Shamsiah Maibon [Pejabat Timbalan Pendakwa Raya Negeri Selangor]

Peguam Tertuduh: OKT hadir [Mewakili Diri Sendiri]

MINIT:

SAMSUDIN BIN MD SUPPIAN [No. Kad Pengenalan: 530707715199] Kesalahan: Seksyen 3768 Kanun Keseksaan dan boleh dihukum dibawah Seksyen 376(3) Kanun Keseksaan dan dibaca bersama Seksyen 16(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017;

Pertuduhan dibaca dan diterangkan dalam Bahasa Malaysia. Tertuduh faham, tertuduh mengaku salah atas pertuduhan Tertuduh faham sifat dan akibat daripada pengakuannya dan berhasrat untuk mengaku salah, tanpa syarat.

DPP
- pohon tangguh sebentar untuk penyediaan fakta kes.

Mahkamah
- Stand down

10.40am
Pihak seperti terdahulu.

DPP – kemukakan

Fakta kes - P1
(dibaca dan diakui benar oleh OKT)

Laporan Polis Bangi 001724/21 - P2
(dibaca dan diakui benar oleh OKT)

Laporan Polis Bangi 001730/21 - P3
(dibaca dan diakui benar oleh OKT)

Rajah kasar - P4
(diterangkan dan diakui benar oleh OKT)

10 keping gambar tempat kejadian - P5A-J
(diterangkan dan diakui benar oleh OKT)

Laporan pemeriksaan awal - P6
(dibaca dan diakui benar oleh OKT)

Sijil kelahiran - P7
(dibaca dan diakui benar oleh OKT)

Rayuan OKT

- Saya pohon hukuman dikurangkan. Saya bekerja sebelum ditangkap sebagai cleaner. Sekarang saya sudah lama tidak bekerja. Saya menanggung isteri dan saya duduk bersama dengan anak. Saya tiada masalah kesihatan.

DPP

- OKT berusia 68 tahun dan mangsa belum mencukupi umur 8 tahun. Perhubungan OKT dan mangsa adalah datuk kandung. Sebagai datuk kandung, OKT sepatutnya menjaga keselamatan dan memberikan kasih sayang kepada mangsa sebagai cucunya dan bukan menggelapkan masa hadapan mangsa.

- Kejadian rogol ke atas cucu sendiri ini akan memberikan impact yang kuat ke atas mangsa. Adalah diharapkan hukuman yang akan diberikan dapat memberikan keinsafan kepada OKT dan OKT bertaubat dan tidak melakukan perkara yang sama pada masa akan datang.

Mahkamah

- OKT didapati bersalah dan disabitkan di atas pertuduhan.

JAMIN:

N/A

HUKUMAN:

SAMSUDIN BIN MD SUPPIAN [No. Kad Pengenalan: 530707715199] Kesalahan: Seksyen 376B Kanun Keseksaan dan boleh dihukum dibawah Seksyen 376 (3) Kanun Keseksaan dan dibaca bersama Seksyen 16(1) Akta Kesalahan-Kesalahan Seksual Terhadap KanakKanak 2017;

Didapati salah dan disabitkan atas pertuduhan.

Pemenjaraan: 18 Tahun Tarikh Ditangkap.

Lain-Lain Hukuman/Perintah: Perintah

1. OKT diperintahkan untuk menjalani kaunseling pemulihan selama 10 tahun di bawah seksyen 26(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

2. OKT diperintahkan untuk menjalani pengawasan polis selama 3 tahun setelah selesai menjalani hukuman pemenjaraan di bawah seksyen 27(1) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

Kaedah Pelupusan; Mengaku Salah (MS)

KEPUTUSAN:

Dilupuskan (Bukan Bicara Penuh) - Mengaku Salah

TARIKH AKAN DATANG:

Diendoskan oleh,
Puan Yong Zarida Binti Sazali

[31] Berdasarkan nota prosiding yang tercatat di dalam rekod rayuan di atas adalah jelas bahawa Hakim Mahkamah Jenayah Seksual Terhadap Kanak-Kanak yang bijaksana telah mematuhi kesemua kehendak peruntukan di bawah s. 173(b) Kanun Tatacara Jenayah dengan sempurna sebelum beliau merekodkan sabitan dan hukuman. Bukan setakat itu sahaja, kesemua keterangan dokumentari yang dikemukakan dan ditandakan di mahkamah sebagai eksh. P1 sehingga P7 juga turut dibacakan kepada perayu dan ada juga ekshibit yang diterangkan kepada perayu bagi memudahkan beliau memahaminya. Kesemua ekshibit-ekshibit ini kemudiannya diakui benar oleh perayu. Perayu juga telah mengemukakan mitigasinya sebelum mahkamah menjatuhkan hukuman.

[32] Di peringkat rayuan di Mahkamah Tinggi pula, Persuruhjaya Kehakiman yang bijaksana juga turut mengesahkan dan mengekalkan sabitan dengan menyatakan seperti berikut:

> [15] Setelah meneilti Nota Keterangan seperti di Jilid 2 Rekod Rayuan, mahkamah mendapati tiada kesilapan tatacara dalam pengakuan salah Perayu/Tertuduh dan pengakuannya adalah tidak bersyarat. Perayu/Tertuduh juga berupaya memberikan mitigasi dengan jelas dan nyata meminta hukuman dikurangkan. Justeru, mahkamah bersetuju dengan dapatan HMS yang bijaksana bahawa peruntukan seksyen 305 Kanun Tatacara Jenayah adalah terpakai dalam kes ini dan menolak rayuan Perayu/Tertuduh. Sabitan dikekalkan.

[33] Sebagai rumusan, kami mendapati tiada sebarang ketidakpatuhan atau pelanggaran prosedur yang berlaku sehingga memprejudiskan perayu atau mendatangkan apa-apa ketidakadilan undang-undang (miscarriage of justice) kepada beliau sepanjang prosiding ini berjalan. Sabitan adalah selamat.

[34] Beralih kepada rayuan terhadap hukuman pula, secara prinsipnya, mahkamah di peringkat rayuan jarang sekali campur tangan atau mengganggu hukuman yang dijatuhkan oleh hakim bicara melainkan terdapat alasan-alasan yang kukuh dan mendesak untuk berbuat demikian.

[35] Dalam kes *Bhandulananda Jayatilake v. PP* [1981] CLJU 139; [1981] 1 LNS 139; [1982] 1 MLJ 83, Mahkamah Persekutuan melalui penghakiman yang disampaikan oleh Raja Azlan Shah Ag LP menyatakan seperti berikut:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being

A what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with
B leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.
C

[36] Dalam kes *PP v. Prabu Veeramuthu & Ors* [2010] 8 CLJ 257, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Hasan Lah HMR (beliau pada ketika itu) menyatakan seperti berikut:

[11] In an appeal against sentence an appellate court would not disturb
D the sentence imposed unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorized or extraneous exercise of discretion (see *Ganesan a/l Nachiappan & Ors v. Public Prosecutor* [2000] 3 CLJ 302; *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256; *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139; [1982] 1 MLJ 83 and *Yit Kean Hong v. PP* [2005] 4 CLJ
E 592.)

[37] Dalam kes *PP v. Ramakrishnan Subramaniam & Ors* [2012] 9 CLJ 443, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Azahar Mohamed HMR (beliau pada ketika itu) menyatakan seperti berikut:

F Mengikut prinsip penghukuman yang sedia ada, setiap orang yang bersalah akan menerima hukuman yang setimpal dengan bentuk kesalahan yang dilakukan. Mahkamah hendaklah menjatuhkan hukuman menurut undang-undang untuk menentukan supaya hukuman yang dikenakan terhadap pesalah itu adil, bersesuaian dan setimpal dengan apa-apa kesalahan yang dilakukannya itu. Adalah juga menjadi prinsip
G undang-undang yang mantap bahawa Mahkamah yang mendengar rayuan tidak seharusnya campur tangan dengan hukuman yang dikenakan oleh hakim perbicaraan dan selalunya tidak akan menukar hukuman melainkan ianya berpuas hati bahawa hukuman yang dijatuhkan oleh hakim berkenaan itu ternyata amat tidak memadai atau mencukupi atau keterlaluan atau tidak sah atau pun tidak merupakan hukuman yang wajar
H memandangkan semua fakta yang didedahkan, atau bahawa Mahkamah tersebut jelas tersalah didalam memakai prinsip yang betul dalam penilaian hukuman. Prinsip undang-undang yang menentukan kawalan dan semakan keputusan berkaitan dengan hukuman telah digariskan dengan jelas dalam kes *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139 dan kes *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457.
I

[38] Dalam kes *Kesavan Baskaran v. PP* [2008] 6 CLJ 390; [2008] 6 MLJ 387, Gopal Sri Ram HMR (beliau pada ketika itu) menyatakan seperti berikut: A

> [7] Generally speaking, a plea of guilt is a strong mitigating circumstance operating in favour of an accused. However, there may be cases where the offence committed is so serious and the circumstances in which it was committed so heinous that a plea of guilt need be given little or no weight. The need to protect the public is another factor that may prevail over a plea of guilt. B
>
> In this context we find it sufficient to refer to the decision of the Criminal Division of the English Court of Appeal in *R v. Costen* (1989) 11 Cr App R (S) 182 at p 184 where Lord Lane LCJ said: C
>
> > But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount. D
>
> [9] Lastly, in *Fu Foo Tong v. Public Prosecutor* [1995] 1 SLR 448, Karthigesu JA when delivering the judgment of the Singapore Court of Appeal expressed views with which we are entirely in agreement: E
>
> > It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction. As Chan Sek Keong J (as he then was) said in *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321 (cited with approval by this court in *Public Prosecutor v. Lee Meow Sim Jenny* [1993] 3 SLR 885). F
> >
> > ... the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. However, I think that their relevance and the weight to be placed on them must depend on the circumstances of each case. I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up. G H

[39] Dalam kes *Tuan Mat Tuan Lonik v. PP* [2009] 4 CLJ 638, Mahkamah Rayuan melalui penghakiman yang disampaikan oleh Suriyadi Halim Omar HMR (beliau pada ketika itu) memutuskan seperti berikut: I

A [20] The appellant here had pleaded guilty to all the despicable offences committed during those years, when the stepdaughter was his ward. Even though a plea of guilt is a mitigating factor and some credit or discount is normally given, not all pleas of guilt may be accorded that privilege. A court has the discretion not to entertain such discounts (*Sau Soo Kim v. PP* [1975] 2 MLJ 134; *Melvani v. PP* [1971] 1 MLJ 137; *PP v. Sulaiman*
B *Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). It is widely known that incest statistically appears to be on the rise, with the victim getting younger by the day, as reported daily by the local media. And no amount of consensual defence will be accepted, be it on ground of religion, morality, or law. With the facts as they were, let alone public interest demands a retributive and deterrent
C sentence, discounts are not appropriate here (*PP v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370; *PP v. Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596).

[21] The appellant is the authority in the household, and every member of the family would inevitably look up to him, not only for guidance, but
D also protection. Unfortunately, the trust was betrayed when he took advantage of his power of strength by regularly forcing himself on the victim. In *Datuk Haji Harun bin Hj. Idris & Ors v. PP* [1978] 1 MLJ 240 the status of the prisoner was taken into account when the former Menteri Besar of Selangor, who had been convicted of the offences of forgery and conspiracy to commit criminal breach of trust, was treated to a more
E severe sentence. When imposing a higher sentence against the former Menteri Besar as compared to the co-accused, Wan Suleiman FJ had stated:

> We are of the opinion that he was the principal actor in this drama. But for him and his support for the big fight, these crimes might
F not have been committed and his co-accused who look up to him and were loyal to him might not have got into trouble … in view of … the need for people in public life to show a good example to those below them and of the serious breach of trust placed in him by the members of the bank who were poor people from rural areas who have a right to expect their leaders not to touch a penny
G of money entrusted to his care, we are of the opinion that this appellant should serve a longer period in prison than the second …

[23] Here, where there is a need for each and every rape to be punished, let alone if the sentence of the second charge were not ordered to run
H consecutively with the first charge, the appellant in no time would be back on the street, not only free to terrorise his family members but also exact revenge on the wife who lodged the police report against him.

[24] An appellate court will not be overly ready to interfere with any sentence imposed by the trial court unless there are very good reasons to
I do so.

[40] Kes-kes yang melibatkan jenayah seksual adalah suatu kesalahan yang keji dan mengaibkan lebih-lebih lagi di dalam kes ini di mana mangsa telah dirogol oleh datuknya sendiri. Lebih memalukan perayu ketika itu berusia 68 tahun tergamak merogol cucunya sendiri, seorang murid sekolah darjah satu yang pada ketika itu baru sahaja berusia tujuh tahun tujuh bulan. Perayu yang diamanahkan untuk menjaga cucunya telah mengambil kesempatan memuaskan nafsunya semasa ibu bapa mangsa tiada di rumah. Amanah yang diletakkan di atas bahu perayu oleh kedua-dua ibu bapa mangsa untuk menjaga mangsa telah dikhianati oleh perayu.

[41] Justeru itu, hukuman berat wajar dikenakan terhadap perayu sebagai pengajaran kepada beliau dan amaran kepada masyarakat umum supaya jangan sesekali terlibat di dalam jenayah sebegini di masa-masa hadapan.

[42] Dalam kes *Ong Lai Kim & Ors v. PP* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376; [1991] 3 MLJ 111, Zakaria Yatim H (beliau pada ketika itu) mengatakan seperti berikut:

> The offence of rape is rampant in this country. The court will be failing in his duty if it does not impose a deterrent sentence in this case. The punishment must not only deter others from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment Inflicted for grave offence including the crime of rape should adequately reflect the revulsion felt by the great majority of society.

[43] Dalam kes *PP v. William Ayau* [2005] 6 CLJ 289; [2005] 4 MLJ 328 Sulong Matjeraie H (beliau pada ketika itu) mengatakan seperti berikut:

> There should be a 'turning of tide' in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapist. This court takes judicial notice of the frequent reports in the national and local newspaper of incidents of rape. Sometimes these can be brutal and have understandably triggered an outpouring of rage with mounting public pressure to come down hard on rapist. Let the message be heard, loud and clear, that in this court there is zero tolerance of rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years and shall also be liable to whipping.
>
> It is incumbent upon a judge to impose a just and appropriate sentence in rape cases to inspire the public confidence in the rule of law. The judge's duty to uphold the rule of law is of particular importance when the judge is dealing with the laws which protect the community from crime, such as rape cases. In this context the Judge's preliminary responsibility is the protection of the public. Community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have public protection at the forefront of his mind.

A **[44]** Tidak dapat dinafikan bahawa perayu telah membuat pengakuan salah dan ini telah menjimatkan masa dan kos kesemua pihak yang terlibat termasuk saksi-saksi pendakwaan yang juga tidak perlu dipanggil untuk memberi keterangan. Namun begitu, kepentingan individu tidak harus mengatasi kepentingan awam.

B **Kesimpulan**

[45] Kami sebulat suara menolak rayuan perayu terhadap sabitan dan hukuman. Lain-lain perintah tambahan yang diberikan oleh Mahkamah Tinggi juga turut dikekalkan.

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